SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

ISABELLE HAMMOND-KNOWLTON, as Administratrix *cum testamento annexo de bonis non* of the Estate of Charles C. Knowlton, deceased,

Petitioner,

against

THE UNITED STATES OF AMERICA, as substituted defendant for THE HARTFORD CONNECTICUT TRUST COMPANY OF HARTFORD CONNECTICUT, Executor u/w Robert O. Eaton, deceased, former Collector of Internal Revenue,

Respondent.

BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit, per Frank, C. J., handed down June 24, 1941, not yet reported will be found in the record herewith.

The memorandum decision by Thomas, D. J., denying defendant's motion to dismiss, will be found at T. R. page 48.

The memorandum opinion of Moskowitz, D. J., refusing to review orders of a judge of co-ordinate jurisdiction, will be found at T. R. page 51.

The decision of Hincks, D. J., the trial judge, directing entry of judgment will be found at T. R., pp. 59-69. None are officially reported.

The opinion of the Circuit Court of Appeals, per Manton, C. J., handed down April 5, 1937, reversing the first judgment entered April 30, 1936, is reported in 89 Federal Reporter (2nd) 175.

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347 [a]), providing for the issuance of writs of certiorari to review the decree of the Circuit Court of Appeals.

The order for mandate was issued July 21, 1941, and this application for appeal will be presented prior to July 31, 1941.

Statement of Facts.

Charles C. Knowlton died October 12, 1924, resident in Connecticut. On or before October 10, 1925, the sum of $59,764.55, on account of the (estimated) Federal estate tax liability as disclosed by the executor's return, was paid to the Collector of Internal Revenue for the District of Connecticut. The Connecticut State inheritance tax on Mr. Knowlton's estate was paid to the State of Connecticut as follows: On April 12, 1927, $72,372.21 on account of the then undetermined State inheritance tax; on October 16, 1930, $278.78, balance of said tax as finally determined.

The Commissioner audited the return and on October 21, 1926, determined the total basic tax at the sum of $59,155.51, advising the taxpayer by letter of this determination.

On December 29, 1931, the plaintiff, as required by Article 9 of Treasury Regulation 68, filed with the Commissioner proof of the complete liquidation on Octo-

ber 16, 1930, of such Connecticut State tax, and requested that the 25% statutory credit for State inheritance tax actually paid be allowed, the final tax liability of the taxpayer determined and the amount of the overpayment, thereby resulting, refunded.

On July 6, 1932, the Commissioner of Internal Revenue characterizing the documents filed December 26, 1931, as a "claim for refund," rejected same on the ground that Section 3228 of the Revised Statutes provides that claims for the refund of an erroneous tax or an excessive sum in any manner wrongfully collected should be filed within four years after the payment of the tax or sum sought to be recovered. On February 4, 1933, he refused to reopen the claim for the same reason.

On March 1, 1933, suit was instituted, Robert O. Eaton, the Collector of Internal Revenue, to whom said payment of $59,764.55 had been made when the return was filed, being named as sole defendant in his official capacity.

The complaint was for money had and received alleging overpayment of $15,397.92, such amount being the difference between $59,764.55, the amount paid, and $44,366.63, the amount of the determined tax of $59,155.57 less the 25% credit of $14,788.88 allowable under the Statute (Revenue Act of 1924, Section 301 [b]). Judgment was demanded of the defendant in such amount.

Issue having been joined by answer interposed on behalf of said defendant, the cause came on to be heard before District Judge Carroll C. Hincks on stipulated facts, trial by jury having been waived. The Court held that on the record the plaintiff had satisfied the requirements of Sections 3228 and 3226 of the Revised Statutes with respect to the claim for credit of $14,788.88, but that with respect to the balance sued for of $609.04 the claim therefor had not been filed within due time.

Judgment for $14,788.88 in favor of plaintiff was entered April 30, 1936. The government's appeal therefrom came on for argument on March 10, 1937, and said judgment was reversed, a new trial being ordered by mandate entered April 30, 1937.

Judge Manton, having held that the action was not maintainable against the Collector, substitution of the United States of America as defendant was effected *nunc pro tunc* by order dated June 2, 1938; the complaint amended to reflect such substitution and the amount alleged to be owing from the United States reduced to $10,000 to comply with the jurisdictional limits of the Tucker Act (28 U. S. C. A., Section 41 [20]).

Issue being joined by answer to amended complaint, the cause was in accordance with said mandate retried before Judge Hincks, who was given the judgment for $10,000 from which the government has successfully appealed.

Specification of Errors.

The Circuit Court of Appeals *erred:*

1. In holding that the substitution as defendant of the United States of America for the Collector of Internal Revenue constituted the bringing of a new action, as of June 2, 1938, the date of substitution, the Statute of Limitations thereby acting as a bar.

2. In holding that a suit against the Collector is based on the legal fiction that it is "personal" to him and in not holding that it is a remedy authorized by Statute to enable the taxpayer to recover his due from the United States.

3. In holding that the decision on the prior appeal, *i. e.*, that the petitioner could not have recovered judgment against the Collector, was correct.

4. It further erred in not affirming the judgment obtained below.

Questions Presented.

1. Whether, in view of the enactment of Revenue Acts providing that payment of estate taxes shall be made to Collectors of Internal Revenue for the purpose of discharging *pro tanto* a tax liability thereunder, prior to audit of the return by the Commissioner of Internal Revenue and his final determination of the amount of such tax liability (superseding the former procedure of assessment by the Commissioner of a tax in specific amount followed by issuance of warrant to the Collector to exact such tax), the Collector is merely a conduit whereby payments are received by the Treasury and that, therefore, his only personal accountability is to the United States.

2. Whether a suit by a taxpayer may be properly brought in the United States District Court for the recovery from the United States of a sum of money which the Court may determine is in excess of what the United States may lawfully demand or be entitled to, the complaint in such suit being *in assumpsit* for money had and received and judgment being demanded of the defendant sued, *eo nomine,* as payee only.

3. Whether a suit against a Collector of Internal Revenue as authorized by the provisions of the Act of July 13, 1866, 14 Stat. 111, *et seq.*, now found with immaterial verbal changes in Section 3220 of Revised Statutes, is a remedy given by Congress for bringing the government into court, or whether such a suit is the outgrowth of the various doctrines, devised in early times by the

Courts to do justice to taxpayers; viz: that such a suit is "personal" to the Collector, *i. e.*, that it is based on his personal responsibility and does not become a suit against the United States unless and until a certificate of the Trial Judge that he acted with probable cause is issued.

4. Whereas on the former appeal the Circuit Court has inclined to the view that to warrant a suit against a collector he must be the person who commits the act which is in derogation of plaintiff's rights, and mandated the cause for a new trial in order that the factual issue as to the meaning of Article 9, Regulations 68, governing the submission of proof of payment of State inheritance taxes for credit purposes be determined on such trial, and the plaintiff in compliance with such decision and mandate effected a substitution of defendant, reduced the *ad damnum* from $14,788.78 to $10,000 and brought the suit to re-trial on the same pleadings, does it accord with justice as deducible from a reasonable interpretation of the decisions of the courts, to hold that a suit against a collector and one against the United States on the state of facts identically proven in both trials, are distinct causes of action and that the substitution of the United States as defendant was the same as the bringing of a new and different suit which thereby became barred by the statute of limitations?

5. Finally, whether this Honorable Court having resolved the apparent conflict in the decisions cited in Judge Frank's opinion as applicable to the case at bar and having considered the authorities cited therein will determine that the petitioner is entitled to the relief as herein prayed for?

Argument.

The argument of the petitioner may be summarized in the following propositions:

1. The District Court is the proper forum for suit to adjudge allowance of the 25% statutory credit on account of State inheritance tax paid and to enter judgment for the over-payment of federal estate tax unlawfully retained, and it is by statutory authorization that the Collector of Internal Revenue to whom the payment was made is named as defendant, provided he is still in office. If dead or out of office, the United States, by virtue of the 1921 amendment to the Tucker Act (42 Stat. at Large 311; 28 U. S. C. A. §41 [20]), is the proper party.

2. Inasmuch as payment under protest is no longer a prerequisite to suit,* tax payments being made to discharge *pro tanto* a tax liability to be finally determined by the Commissioner after audit of the return, the acts of the Collector in receiving the return and accompanying payment are merely links in the chain of events leading up to the final settlement of the estate tax. The predication of illegality to the act of receiving the payment is not a condition precedent to suit against him when it subsequently appears that the government has been overpaid.

3. The *rationale* of a suit in the District Court for the recovery of estate tax over-payments, the payee Collector being named as sole defendant, is that it is a specific remedy given by Congress to recover from the Government the amount of tax unlawfully retained.

4. The Circuit Court of Appeals has interpreted recent decisions of the Supreme Court as reverting to the thesis that a suit against the Collector is "personal" in its in-

* R. S. 3226 (b).

cidents and has erroneously justified reversal of the judgment on such pronouncements.

5. If the first three propositions are, in the judgment of this Honorable Court, well founded in law, it will be competent for your Honors, after reviewing the transcript of record, to decree (1) that said determination of the Circuit Court of Appeals be reversed in respect of its opinion that plaintiff's action was barred by the Statute of Limitations and (2) to decide that the District Court on the evidence before it on the second trial and in conformity with Judge Manton's opinion in interpreting the applicability of R. S. §3228 correctly held that the claim for refund was timely filed with the Commissioner;—to the end that the judgment rendered by the District Court in favor of plaintiff be affirmed in the sum of $10,000.

POINTS.

I.

The suit is properly maintainable in the District Court against the Collector of Internal Revenue to whom payment was made and in office at the time of filing the complaint and the issuance of the precipe.

The Collector was named as sole defendant in a suit for money had and received on the authority of *Philadelphia v. Collector,* 5 Wallace Reports 720-736 (decided December Term 1866). This was the first case brought and decided after passage of the act on July 1, 1862, of Congress providing for the appointment of Collectors of Internal Revenue, and after the enactment of the provis-

ion now found in R. S. 3220 *(ante)*, authorizing suits against such officials. After referring to and quoting at length from the various sections of this legislation providing for the duty of Collectors appointed thereunder to pay over the amounts received by them into the Treasury of the United States (13 Stat. at Large 487) and adverting to the provision that the Commissioner be authorized to repay the amounts of judgments that may be recovered against collectors for any taxes collected by them, Mr. Justice Clifford, the writer of the opinion, says at page 731:

> "Necessary implication from those prov ions is that actions may be maintained against collectors of the internal revenue to recover back duties illegally or erroneously assessed. Authority is also conferred upon the commissioner (by Stat. at Large 239) not only to pay back all duties erroneously or illegally assessed or collected, but also all duties that appear to be excessive in amount and to repay to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them in any court for any internal duties or licenses collected by them with costs and expenses of suit."

Further, on same page:

> "Appropriate remedy to recover back money paid under protest on account of duties or taxes erroneously or illegally assessed is an action of *assumpsit* for money had and received."

Again at page 733:

> "Clear implication of the several provisions is that a judgment against the Collector in such a case is in the nature of a recovery against the United States and that the amount recovered is regarded as a proper charge against the revenue collected from that source."

It will be observed that suit must be brought against the Collector who received the tax payment. In that sense the suit is "personal" to him and has been so held where suits were brought against his successor in office, judgment being denied because the successor had no part in the transaction (*e. g., Smietanka v. Indiana Steel Co.*, 257 U. S. 1). If the Collector who received the tax payment died, suit was properly brought, or as in our case revived, against his legal representative. In 1921 an amendment to the Tucker Act *(supra)* permitted suit in the District Court against the United States when the Collector to whom payment was made is out of office at the time suit is brought and in such case the $10,000 limitation does not apply (*Lowe Bros. v. United States,* 304 U. S. 302).

Thus, in *Philadelphia v. Collector (supra),* the first case in which the right of the taxpayer to sue a Collector of Internal Revenue was challenged, the Supreme Court has unequivocally sanctioned such procedure as being authorized by statute.

As to its function remedially see Point III *(infra).*

II.

It is not a prerequisite to the maintenance of the suit that the payment be unlawful when made to the Collector.

Prior to the enactment of income and estate tax legislation which provided for payment of taxes in advance of official determination of the taxpapers' liability, taxes were assessed in specific amounts and warrants delivered to the Collector to exact payment by demand and, if necessary, distraint. Accordingly, it was incumbent on

the taxpayer who deemed the tax erroneous or excessive to accompany his payment with a protest as a prerequisite to suit. At the time when Judge Clifford wrote his opinion in *Philadelphia v. Collector (supra)* such situation existed so that his references to duties or taxes as being "illegally or erroneously assessed" and money as being "paid under protest" merely reflected the times. Were he writing his opinion under present day conditions he would use the word "overpayments" and eliminate "under protest." Now, payments made in advance of audit and final determination are merely *pro tanto* a discharge of liability and when such liability becomes over-discharged by excess payment or an allowable credit, a refund is the taxpayer's due. R. S. 3226 as amended by the Revenue Act of 1924 (Appendix, p. 25) providing that suits for the recovery of excessive payments may be maintained whether or not the sum has been paid under protest, is merely declaratory of a principle implicit in the change of procedure (*cf. Moore Ice Cream Co. v. Rose,* 289 U. S. 373 at 378; citing Senate report No. 398, 68th Cong. §1114).

III.

A suit against the payee Collector is remedial and not the assertion of a cause of action in which recovery from him is sought.

Reference has been made in Point I to the decision in *Philadelphia v. Collector (ante).* Four years later (1870) the case of *Collector v. Hubbard,* 12 Wallace 1, came before the Court. Mr. Justice Clifford's opinion from which we quote in full at page 13 is illuminating.

> "6. Prior to the passage of the Act of the 13th of July, 1866, it is quite clear that the taxpayer

> if he was illegally assessed might maintain an action of *assumpsit* against a Collector to recover back the amount if he paid it under protest, although he has not taken any appeal to the Commissioner of Internal Revenue.* Such were the views of this Court in the case of *Philadelphia v. The Collector* (5 Wallace 730), and no doubt is entertained that the decision was entirely correct, but it is a great mistake to suppose that the right to maintain the action as there conceded was founded in the theory that the Collector held money in his hands belonging to the plaintiff which he was bound to refund, as the decision was placed expressly upon the ground that the several provisions in the Internal Revenue Acts before referred to *warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy.*" (Italics ours.)

Here in crystal-clear words is set forth the function of our suit. The conclusion is unescapable. This Court says in effect:

> The Act of July 13, 1866, authorizes the following remedy: The taxpayer after unsuccessful appeal to the Commissioner may sue the collector to whom he has made a tax payment and recover a judgment against him for all taxes that appear to be excessive in amount and when such judgment has been recovered and certificate of probable cause issued the Commissioner of Internal Revenue is authorized to satisfy it.

The *rationale* of that decision has been affirmed by Mr. Justice Cardozo's *dictum* in *Moore Ice Cream Co. v. Rose,* 289 U. S. 373, where, at page 383, he says:

> "* * *, at all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money

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* The reference to the necessity of appeal to the Commissioner is of course, *dictum.*

> over, in such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court."

a paraphrase to all intents and purposes of the principle enunciated by Judge Clifford over sixty years before.

IV.

The thesis that a suit against a Collector is personal in its incidents does not justify a holding that the substitution of the United States constitutes the bringing of a new action.

From a perusal of Judge Frank's opinion, it is evident he considers that a suit against a collector was a procedural fiction judicially sanctioned to do justice to the taxpayer, inasmuch as there then existed no statutory provision for a suit against the Government—this in spite of our citation on our brief in the Appellate Court of *Collector v. Hubbard* (*supra*), in which the *rationale* is definitely explained, i. e., that it is a remedy provided by legislative enactment.

Granted, that the action is so personal in its incidents, that a suit against a successor collector is not warranted: granted, that no claim can be made against the United States unless and until the trial judge issues his certificate of probable cause: granted, that until the 1921 amendment above referred to, extended the jurisdiction to suits against the United States, the deceased collector's personal legal representative and he only was suable—nevertheless and at all events the real cause of action was and still is against the person ultimately liable. Indeed, when we read Judge Frank's opinion so cogently urging that fictions, devised to do justice to the citizen,

should not be employed as instruments of unfairness directed against him, we cannot reconcile it with his conclusions that this alleged "ghostly fiction" has so much vitality that the substitution of the real party in interest for the nominal defendant works a change in the cause of action.

As the mandate directed a new trial, it was evident the Circuit Court considered that the plaintiff might prevail over the limitational defense to allowance of credit by proving what the Commissioner's regulations meant. It was also evident that if substitution of parties had been deemed by the Appellate Court as tantamount to bringing a new suit, the mandating of the cause for a new trial would have been nugatory as it would have inevitably rendered it subject to attack under the statute of limitations. It also precluded the plaintiff from then seeking an appeal to review the correctness of Judge Manton's decision that the suit was not maintainable against the Collector.

We would point out further that Judge Manton as he concludes his opinion has made a factual error in ruling that it was only the conduct of the Commissioner in "disallowing the credit" which has affected the appellee. The allowance or disallowance of a credit in accordance with the mandatory provisions of the statute depends on the sufficiency of proof submitted as to actual payment of State tax. Never has the sufficiency of plaintiff's proof so as to entitle her to the credit been questioned. The Commissioner merely rejected the claim as not timely filed, so that it was the rejection of the claim which affected the appellee and not a disallowance of credit.

It was on the basis of this inaccuracy of statement that the Government was enabled to plead in its answer (Paragraph 19 (d) Transcript of Record, p. 22), as follows:

"(d) The action, if maintainable against the United States in the District Court, must be confined to taxes collected by the Collector and the Circuit Court of Appeals for the Second Circuit in its opinion has ruled that the taxes herein sought to be recovered were not collected by the Collector, but that the collection thereof was effected through the conduct and acts of the Commissioner."

Plaintiff's right to sue the payee collector is in no way impugned by *Lowe Bros. v. United States* (304 U. S. 302), as that case simply held that in a suit against the United States, jurisdiction was not conferred by the 1921 amendment to the Tucker Act (*supra*) unless it appeared that the collector, since deceased or out of office, had actually made the collection, a bookkeeping entry in favor of plaintiff not being a sufficient compliance with the Act. It is an affront to reason and a blinding of one's self to realities to hold that the Commissioner, by rejecting solely on limitational grounds plaintiff's request that she be credited with, say $14,788.88, on the settlement of her account with the Government for estate tax liability, "collected" a tax amounting to $14,788.88.

The realistic approach to a modern tax case is that taxes are "received" by or "paid to" the collector; "determined" by the Commissioner, thereafter "assessed," "credited" or "certified as over-paid" as the case may be, and "discharged" by the taxpayer. The allowance of a credit is a discharge *pro tanto* of the taxpayer's liability. No longer is the sequence "assessment," "collection" and, if justified, "recovery of tax." The modern day procedures provided for the levying of tax by the government and the taxpayer's responsibility to such levy must control the courts in reaching a correct decision.

V.

CONCLUSION.

The minimum justice due plaintiff demands reversal of the determination of the Circuit Court of Appeals and affirmance of the judgment of the District Court.

The application for a writ of certiorari should be granted.

Dated, July 29, 1941.

Respectfully submitted,

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EUGENE D. ALEXANDER,
with him on the brief.